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IN THE
Supreme Court of the United States

DAVE DAHLGREN; DAHLGREN'S, INC.; THEODORE COLLIN; DIXON GRANSTRA D/B/A GRANSTRA CATTLE; DG FARMS, INC.; WELLS AG ENTERPRISES, INC.; DON SJORGREN; BJW FARMS, INC.; EWW FARMS, INC.; AND DWAYNE KUDLACEK,

Petitioners,

v.

FIRST NATIONAL BANK OF HOLDREGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In this civil RICO case, petitioners filed suit against a bank under 18 U.S.C. § 1962(c), alleging (among other things) that the bank "conduct[ed] or participate[d] in the conduct of the affairs" of a bank client, an alleged RICO enterprise. The district court, quoting directly from this Court's decision in *Reves v. Ernst & Young*, 507 U.S. 170, 179, 183 (1993), instructed the jury that the bank could not be liable unless it had "some part in directing" the client's affairs by "participat[ing] in the operation or management" of the client. Petitioners did not object to that instruction, and indeed repeatedly embraced that legal standard at trial and in post-trial proceedings.

The Eighth Circuit, after engaging in an extensive review of the evidence, concluded that the *Reves* test had not been met, because the evidence was insufficient to support a finding that the bank participated in the operation or management of its banking client, a commercial feed lot.

The question presented is whether the Eighth Circuit erred either by following this Court's decision in *Reves*, or by applying that agreed-upon legal standard to the particular facts of this case.

RULE 29.6 STATEMENT

First National Bank of Holdrege is a wholly owned subsidiary of First Holdrege Bancshares, Inc., a privately owned company. No publicly held company owns 10% or more of the stock of First National Bank of Holdrege or its parent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES iv
OPINION BELOW 2
JURISDICTION 2
STATEMENT 2
REASONS FOR DENYING THE PETITION 8
I. PETITIONERS NEVER OBJECTED TO OR CONTESTED THE LEGAL THEORY ACCEPTED BY THE DISTRICT COURT AND THE EIGHTH CIRCUIT 9
II. THE DECISION BELOW DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS OR RUN AFOUL OF THIS COURT'S DECISION IN *REVES* 15
CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Arthur Young & Co. v. Reves,
937 F.2d 1310 (8th Cir. 1991).....11, 23

Bachman v. Bear, Stearns & Co.,
178 F.3d 930 (7th Cir. 1999).....16, 23

Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966
(11th Cir. 1986).....11

City of Springfield, Mass. v. Kibbe,
480 U.S. 257 (1987).....13

Dahlgren v. First Nat'l Bank of Holdrege,
533 F.3d 681 (8th Cir. 2008).....*passim*

First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159
(2d Cir. 2004).....17, 23

Goren v. New Vision Int'l, Inc.,
156 F.3d 721 (7th Cir. 1998).....20

Handeen v. Lemaire,
112 F.3d 1339 (8th Cir. 1997).....18, 19, 23

Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995).....15

Resolution Trust Corp. v. Stone,
998 F.2d 1534 (10th Cir. 1993).....16

Reves v. Ernst & Young,
507 U.S. 170 (1993).....*passim*

United States v. Allen,
155 F.3d 35 (2d Cir. 1998).....22

United States v. Castro,
89 F.3d 1443 (11th Cir. 1996).....17

United States v. Darden,
70 F.3d 1507 (8th Cir. 1995).....15, 18

United States v. Johnston,
268 U.S. 220 (1925).....1

United States v. Posada-Rios,
158 F.3d 832 (5th Cir. 1998).....15, 16

United States v. Starrett,
55 F.3d 1525 (11th Cir. 1995).....15

Univ. of Md. v. Peat, Marwick, Main & Co., 996 F.2d 1534 (3d Cir. 1993).....20

Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948 (D.C. Cir. 1990) (en banc).....11, 23

STATUTES

18 U.S.C. § 1962(c).....*passim*

18 U.S.C. § 1962(d).....18

18 U.S.C. § 1964(c).....5, 8

28 U.S.C. § 1254(1).....2

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent First National Bank of Holdrege ("Holdrege") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioners Dahlgren et al.

The petition should be denied because petitioners long ago waived their central argument that the Eighth Circuit misapplied this Court's holding in *Reves v. Ernst & Young*, 507 U.S. 170 (1993). Petitioners did not object to the relevant jury instruction given by the district court or dispute the legal standard adopted by the court of appeals. To the contrary, petitioners simply disagree with the Eighth Circuit's application of an indisputably correct legal standard to the particular facts of this case.

At bottom, the petition is nothing more than a classic request for error correction. But this Court generally does not exercise certiorari review to engage in error correction. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) (explaining that the Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). It should not do so here. The Eighth Circuit correctly concluded that petitioners had not satisfied the "operation or management" test under *Reves*, as there was no evidence that Holdrege did anything other than look out for its own independent business interests as a creditor to one of its banking clients. Moreover, contrary to

petitioner's suggestion, the decision below does not remotely create any conflict in the lower courts.

OPINION BELOW

The published opinion of the court of appeals is reported at 533 F.3d 681. Pet. App. 1. The final judgment of the district court denying post-trial motions is unreported. Pet. App. 48.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

This case represents an unsuccessful attempt to use the RICO statute, 18 U.S.C. §§ 1961–68, to hold a bank liable for serving as lender to a company that was later discovered to have been managed by a fraudster. The Eighth Circuit below properly refused to impose RICO liability on the bank because there was no evidence that the bank was participating in the operation or management of an "enterprise" (its borrower), as is required by 18 U.S.C. § 1962(c) and by this Court's decision in *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

The facts are accurately set forth in the opinion below. The following is a review of those facts most relevant to the question presented.

Damrow's Operations & Borrowing Practices. Dennis Damrow, who was ultimately convicted of bank fraud for his actions, managed two commercial feed lots and two related financing companies in Nebraska. He also was a significant shareholder of each of these companies. The feed lot businesses were Damrow Cattle Company ("DCC") and Carter Feeders. The associated financing

companies were DFF, Inc. ("DFF") and CFF, Inc. ("CFF"). Pet. App. 3.

The feed lots' primary business was to centralize the purchase, fattening, and sale of cattle. Cattle feeders delivered cattle to DCC, paid DCC to feed and house the cattle, and used DCC as their agent to sell the fattened cattle to meatpackers. These cattle feeders could finance all of these activities by borrowing money from DCC's financing company, DFF. repaying the loans from the proceeds of the cattle's ultimate sale. Pet. App. 3.

For many years, Holdrege was the bank and primary lender to the feed lots and to both financing companies. It loaned funds to DFF (which DFF would then loan to cattle feeders) and to DCC (which DCC would use to run its feed lot operations). After selling fattened cattle, DCC would repay itself for the cost of running its feed lot operations and pay the remaining profit to the cattle feeder. As part of this flow of funds, cattle feeders repaid their loans to DFF, and loans taken from Holdrege by DFF were repaid to Holdrege. Pet. App. 3–4.

By external appearances, this business model was successful. Between 1983 and 2001, DCC's operating capacity grew from 1,200 to 17,500 cattle. Pet. App. 4.

Damrow's Fraud Revealed & Subsequent Litigation. In late 1999, certain shareholders of Carter Feeders (one of the feed lot companies) told Holdrege that they suspected Damrow of providing misinformation to the bank about the health of his business. The owners of Carter Feeders removed Damrow as manager, and within months, Carter Feeders declared bankruptcy. Damrow, still manager of DCC and DFF, was unhappy with

Holdrege's handling of the Carter Feeders problem and asked another bank, First National Bank of Omaha ("FNBO") to take over all of Holdrege's lines of credit to DCC. Pet. App. 6.

In January 2000, Damrow admitted to Holdrege that he had submitted false financial statements to the bank relating to Carter Feeders, but he blamed Carter Feeders' other shareholders for these misrepresentations. On January 9, 2000, Holdrege's board of directors voted to sever the banking relationship with all Damrow-managed entities, including DCC and DFF. The bank asked Damrow to pledge his personal ownership in the DCC feedlot to secure all outstanding lines of credit, and Damrow complied, signing over a deed of trust. FNBO and another bank (Adams Bank & Trust) agreed to take the DCC and DFF lines of credit. DCC and DFF paid their final debts to Holdrege in mid-2000. Pet. App. 6–7.

Within six months of taking over the DCC and DFF lines of credit, FNBO discovered that Damrow was double-counting cattle at DCC. FNBO placed DCC into involuntary receivership. Multiple lawsuits ensued. FNBO and Adams Bank & Trust sued Holdrege for failing to disclose all it knew about DCC; those cases settled. Petitioners—cattle feeders at DCC who lost $1.7 million when DCC collapsed—sought to recover the value of their grain and cattle held at DCC in the bankruptcy proceedings. They were unsuccessful (owing to low priority in the DCC bankruptcy proceedings). Pet. App. 2. Damrow pleaded guilty to bank fraud, admitting that he had

defrauded Holdrege and the other banks by misrepresenting corporate assets. Pet. App. 7.[1]

Petitioners then sued Holdrege on state law tort theories of concealment and misrepresentation, as well as on a federal RICO claim. Pet. App. 2. RICO provides a civil cause of action to any person injured by a violation of RICO's criminal provisions. *See* 18 U.S.C. § 1964(c). Petitioners alleged that Holdrege had violated RICO by "conduct[ing] or participat[ing], directly or indirectly, in the conduct of [an interstate] enterprise's affairs through a pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c). The alleged "enterprise" was DCC, the commercial feed lot. Pet. App. 8. In essence, petitioners asserted that Holdrege had not merely provided banking services to DCC but had directed or controlled DCC within the meaning of § 1962(c). The jury found Holdrege liable on all claims and the district court denied Holdrege's post-trial motions. The district court awarded treble damages and attorneys' fees on the RICO count. Pet. App. 1, 48–49.

The Eighth Circuit affirmed some of the state law counts (and those prevailing plaintiffs do not join in the petition) but reversed on the RICO count and remaining state law claims. The court held the evidence was insufficient to support a finding that Holdrege directed or controlled DCC within the meaning of RICO § 1962(c). Pet. App. 15.

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[1] Contrary to petitioners' assertion, Damrow was convicted of *defrauding* Holdrege, not conspiring with it. Pet. 7.

Alleged Evidence of Direction or Control. The Eighth Circuit analyzed all of the facts that petitioners asserted could support a finding that Holdrege "conduct[ed] or participate[d] . . . in the conduct of [DCC's] affairs" within the meaning of § 1962(c)—and rejected all of them. Pet. App. 9. Petitioners essentially contended that Holdrege sought to prop up DCC in order to protect its own interests as a creditor of DCC. (As demonstrated by Damrow's bank fraud guilty plea, Holdrege was itself a victim of Damrow's fraudulent conduct.) The facts petitioners sought to establish at trial in support of their § 1962(c) claim fall into four categories.

- Petitioners contended that Holdrege extended loans to DCC beyond DCC's credit line. For example, they alleged that Holdrege: occasionally honored DCC's non-sufficient funds ("n.s.f.") checks; allowed DCC's line of credit to remain overdrawn; allowed DCC and DFF to commingle funds; told Damrow he would need to increase his equity in DCC to be eligible for additional loans; and shifted funds between DCC and DFF accounts as allowed by agreement but without Damrow's knowledge. Pet. App. 11–12.

- Petitioners alleged that Holdrege recommended DCC to Holdrege's other customers and encouraged FNBO to participate in DCC's line of credit. Pet. App. 11.

- Petitioners alleged that at the end of Holdrege and Damrow's relationship, as FNBO was taking over the lines of credit, Holdrege requested and obtained Damrow's pledge of his personal ownership of DCC's

feed lot to secure the DCC line of credit. Pet. App. 12.

- Petitioners contended that, in 1994, Holdrege asked Damrow to have DCC and Carter Feeders purchase cattle that Holdrege had acquired from a cattle broker through a foreclosure and wished to dispose of. Pet. App. 12–14. Holdrege extended DCC and Carter Feeders credit to finance this purchase. Pet. App. 12–13. Petitioners allege that this purchase occurred at an inflated price, and that DCC would not have purchased the foreclosed cattle had it not been "controlled" by Holdrege. Pet. App. 14. Petitioners also contended that Holdrege and Damrow altered promissory notes made by the defaulting cattle broker to make it appear that the cattle broker's livestock auction company, and not the cattle broker personally, had signed them. Pet. App. 13. This conduct prompted litigation in the cattle broker's bankruptcy action against Holdrege and DCC, resulting in a settlement to which Holdrege and DCC contributed. Pet. App. 13–14. Petitioners again contended that DCC would not have parted with these funds but for Holdrege's "control[]" over it. Pet. App. 14.

The Eighth Circuit held that all of these allegations fell into the category of "a creditor conducting its own affairs" and that none supported a finding that Holdrege had "conduct[ed] or participate[d], directly or indirectly, in the conduct of [DCC's] affairs" within the meaning of § 1962(c). Pet. App. 11, 14–15. As the court of appeals recognized, Holdrege had its own independent and

compelling business reasons for engaging in these activities. Holdrege sought to protect its ability to be repaid on its loans to the Damrow entities—and in taking actions to vindicate its own economic interests, Holdrege had engaged in the "operation or management" of Damrow's purported RICO "enterprise," the commercial feed lot. Pet. App. 11–12, 14–15.

REASONS FOR DENYING THE PETITION

The petition should be denied because the Eighth Circuit did not err in following this Court's decision in *Reves v. Ernst & Young*, 507 U.S. 170 (1993). Although petitioners now contend that Eighth Circuit applied an incorrect legal standard, they long ago abandoned that argument by accepting and endorsing the legal standard applied by the district court and the Eighth Circuit. At bottom, petitioners merely dispute the application of a concededly correct legal standard to the particular facts of this case. But the Eighth Circuit applied *Reves* correctly on this particular record. The decision below was not error, and it creates no conflict in the lower courts. It does not warrant this Court's review.

The RICO statute's civil suit provision, 18 U.S.C. § 1964(c), provides a civil cause of action for those injured by a violation of RICO's criminal provisions, *id.* § 1962. Petitioners alleged that Holdrege, a bank, had "conduct[ed] or participate[d], directly or indirectly, in the conduct of [an interstate] enterprise's affairs through a pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c). The alleged enterprise was DCC, a commercial feed lot and customer of Holdrege.

Fifteen years ago, in *Reves v. Ernst & Young*, this Court resolved a conflict among the courts of

appeals regarding the meaning of "conduct" and "participate" in § 1962(c). 507 U.S. 170 (1993). The Court adopted the "operation or management" test, which—in order to establish liability under § 1962(c)—requires a showing that a defendant have "some part in directing" a RICO enterprise's affairs. *Id.* at 179. The Eighth Circuit below applied *Reves* and reversed a jury finding of liability because, after reviewing the record, it found no evidence that the bank (Holdrege) had participated in the "operation or management" of its customer (DCC).

Petitioners have repeatedly acknowledged the accuracy of the legal standard recited by the Eighth Circuit below. Accordingly, their petition is merely a request to correct an asserted error in the Eighth Circuit's application of governing Supreme Court precedent to the facts of this case. Moreover, the circuit conflict alleged by petitioners is wholly illusory. The Eighth Circuit canvassed out-of-circuit authority and concluded that "we have not found any post-*Reves* case in which a bank or financial services company was held to have conducted the affairs of a RICO enterprise that was an unrelated customer of the bank." Pet. App. 11. Petitioners' attempt to demonstrate a conflict is based on cases involving materially different fact patterns, selective quotations, and stale academic commentary critical of this Court's decision in *Reves*. The petition should be denied.

I. PETITIONERS NEVER OBJECTED TO OR CONTESTED THE LEGAL THEORY ACCEPTED BY THE DISTRICT COURT AND THE EIGHTH CIRCUIT.

Petitioners contend that the court below held them to an erroneous legal standard. But at trial petitioners did not object to jury instructions

embodying that standard. To the contrary, petitioners recited that standard in their closing argument to the jury; endorsed the standard in their post-trial brief; and conceded in their petition to this Court that the relevant jury instruction was legally correct. The standard in question derives from this Court's decision in *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

1. *The Reves decision.* Section 1962(c) of the RICO statute makes it illegal to "conduct or participate" in the "conduct" of an "enterprise" through a pattern of racketeering activity. 18 U.S.C. § 1962(c). Enterprises may be legal entities, such as DCC in this case (a corporation), or associations-in-fact of individuals or other entities. Enterprises may be legitimate companies, like DCC in this case (a commercial feed lot), or may themselves be illegitimate, such as a drug cartel or a racketeering enterprise. Individuals accused under this statute ("RICO defendants") may be inside employees of the enterprise, or may be outsiders—for example: lawyers, accountants, or, as in this case, banks. This case, like *Reves*, focuses on the element of the § 1962(c) RICO claim requiring proof that the defendant "conduct[ed] or participate[d]" in the enterprise's conduct when the RICO defendant is an "outsider" to the enterprise.[2]

Until 15 years ago, the circuits were divided over the showing necessary to establish that a RICO defendant had "conduct[ed] or participat[ed]" in the

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[2] The court of appeals below did not reach any other elements of the RICO claim. Pet. App. 15.

conduct of an enterprise under Section 1962(c). Several courts of appeals required little interaction between the RICO defendant and the "enterprise" and required the plaintiff to establish only that the RICO defendant performed activities "necessary or helpful" to the enterprise. *E.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986). By contrast, the D.C. Circuit required proof that the RICO defendant exercised "significant control" over the enterprise. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc); *see Reves*, 507 U.S. at 179 n.4. Between these extremes was the Eighth Circuit, which interpreted the statute to preclude liability under Section 1962(c) unless the RICO defendant participated in the "operation or management" of the enterprise. *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1324 (8th Cir. 1991).

In *Reves*, this Court resolved the circuit split by adopting the Eighth Circuit's "operation or management" test. The Court held that the text of the statute required the RICO defendant to play some part in "directing" the enterprise's affairs by participating in the operation or management of the enterprise. *Reves*, 507 U.S. at 178–79, 185. Merely aiding and abetting or merely participating in the enterprise's affairs does not suffice. *Id.* at 178. The Court dismissed the government's argument as *amicus* that the "operation or management" test would immunize outsiders from RICO liability, stating that outsiders could be liable despite their outsider status if they operated or managed the enterprise's affairs—"as, for example, by bribery." *Id.* at 184–85. In *Reves*, the defendant was never alleged to be inside the enterprise. The Court

therefore explicitly left open how far down the management chain an insider RICO defendant could go and still be held to have "participate[d] in the operation or management" of the enterprise that employed him. *Id.* at 184 & n.9.

Thus, the state of the law after *Reves* is that outsiders to an enterprise cannot be liable under § 1962(c) unless they participated in the "operation or management" of the enterprise, meaning they had at least "some part in directing" the enterprise's affairs. *Id.* at 179.

2. *Petitioners' repeated adoption of the "control" standard.* Petitioners devote the bulk of their petition to demonstrating a purported conflict in the courts of appeals over the meaning of *Reves*. The nature of this conflict is nowhere explained concretely. Petitioners appear to believe that some circuits require a showing of "control" over the alleged "enterprise," while others require a showing of "direction" over the enterprise. Pet. at 19–20, 26–29. Petitioners also appear to suggest that the "control" standard is more burdensome than the "direction" standard, and that the "direction" standard is more faithful to *Reves*. Although the petition never clearly says so, petitioners appear to suggest that they would have prevailed below had the court of appeals applied the "direction" standard instead of the "control" standard. The fundamental problem with this contention is that it was waived long, long ago.

Petitioners did not object to the final jury instructions, which included the statement that

"[t]he word 'conducts' means the defendant exercised some degree of control over the enterprise's affairs." R.386 at 27; Tr.XVIII at 3029–35.[3] Petitioners' failure to object at trial "makes this case an inappropriate vehicle for resolving" whether there is a meaningful difference between a jury instruction that uses the word "control" and one that uses the word "direction." *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing the writ as improvidently granted). Indeed, the rule that this Court "ordinarily will not decide questions not raised or litigated in the lower courts . . . has special force where the party seeking to argue the issue has failed to object to a jury instruction." *Id.* That is the case here.

Moreover, petitioners affirmatively adopted the "control" standard in their closing arguments to the jury. Counsel for petitioners stated: "one of the elements of the RICO claim is that we need to demonstrate how First National Bank of Holdrege controlled Damrow Cattle Company." Tr.XVIII at 3050. Indeed, petitioners repeatedly told the jury the standard was "control." Tr.XVIII at 3050, 3054–55.

Petitioners also conceded in their post-trial brief that the "control" instruction was equivalent to other valid articulations of the *Reves* test. Holdrege had argued that the evidence was insufficient "to show that [Holdrege] controlled DCC's operations within

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[3] R.386 refers to docket entry 386 of the PACER record of the trial court, D. Neb. No. 8:05-CV-15. Tr. refers to the trial transcript.

the meaning of RICO." R.411 at 6. In response, petitioners did not argue that the "control" standard was erroneous; instead they argued that the evidence "might indeed have been enough to prove [Holdrege's] intimate involvement and control over [DCC]." R.414 at 6. This is just one of approximately 13 times in their post-trial brief that petitioners accepted that the "control" language is a valid paraphrasing of *Reves*'s "operation or management" test. R.414 at 6, 7, 12, 16–18, 23–25.

Petitioners also conceded in their petition to this Court that the jury instructions, which included the "control" standard, were a fair statement of the *Reves* test. Pet. at 37.

Given petitioners' repeated agreement that the "control" instruction was valid, this Court should not entertain the argument that review is warranted because the Eighth Circuit erred, or misapplied *Reves*, or otherwise created a conflict with other courts, by requiring a showing of "control" under 1962(c). For that reason, the question that petitioners claim is "presented"—whether a bank that "for its own benefit actively assists in carrying out a fraudulent scheme involving its customer" may be held liable under § 1962(c)—is not presented in this case. Pet. i. Petitioners never proposed an interpretation of RICO that would impose liability if an outsider acted "for its own benefit" or if the outsider "actively assists" an alleged RICO enterprise. Instead, it agreed to and endorsed the legal standard applied in both courts below.

II. THE DECISION BELOW DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS OR RUN AFOUL OF THIS COURT'S DECISION IN *REVES*.

Moreover, there is no conflict in the courts of appeals presented by this case. Petitioners allege that there are a number of "conflicting" interpretations of § 1962(c), but all of these fade away under close analysis.

1. To begin with, many of petitioners' cases are simply irrelevant to this case and to the purported question presented. *Reves* expressly did *not* address cases of insider liability: the Court declined to consider how far "down the ladder" liability might attach to RICO defendants who are insiders and who are alleged to "operat[e]" or "manage[]" the affairs of the "enterprise" that employs them. 507 U.S. at 184 & n.9. Yet, to demonstrate a purported conflict, petitioners rely principally upon snippets from insider cases. Petitioners cite as "conflicting" authority insider cases such as *United States v. Posada-Rios*, 158 F.3d 832, 856 (5th Cir. 1998) (defendant was a mid-level distributor in a drug cartel); *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995) (defendants were owners and managers of car dealership enterprise); *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995) (defendants were the kingpin and mid-level managers in a drug distribution ring); and *United States v. Starrett*, 55 F.3d 1525, 1542, 1545–46 (11th Cir. 1995) (defendant was member of biker gang and had some role in the gang's direction).

These "insider" cases addressing the issue left open in *Reves* have no bearing whatsoever in this, an outsider case. Indeed, the Fifth Circuit in *Posada-Rios*—a case petitioners cite as "conflicting" with the

decision below—expressly distinguished *Reves* on the basis of the insider–outsider distinction. The court stated that "unlike *Reves*, which involved a defendant with a 'horizontal' connection to the enterprise [i.e., an outsider], [*Posada-Rios*] presents the 'vertical' question of how far RICO liability may extend down the organizational ladder." 158 F.3d at 856 (citation omitted). Petitioners cannot point to a slew of insider cases (where the issues are very different) to support the existence of a conflict with cases like this one, which involve outsider liability.

2. In addition to citing irrelevant "insider" cases, petitioners also mischaracterize the holdings of several decisions they suggest are in conflict with the decision below. In *Bachman v. Bear, Stearns & Co.*, for example, the Seventh Circuit held that a bank does not conduct an enterprise's affairs when it merely provides a service for hire (in that case, stock valuation). 178 F.3d 930, 932 (7th Cir. 1999). The outcome in *Bachman* is in accord with the outcome in *Reves* itself: neither the outside accountant (*Reves*) nor the outside bank (*Bachman*) conducted the enterprise merely by providing services to it—just as Holdrege did not control DCC merely by acting as its lender. Petitioners err in suggesting that *Bachman* somehow conflicts with the decision below.

Similarly, in *Resolution Trust Corp. v. Stone*, the Tenth Circuit affirmed a jury verdict finding a RICO defendant liable because of the "abundant" evidence that he participated in the conduct of the enterprise. 998 F.2d 1534, 1542 (10th Cir. 1993). Contrary to petitioners' implication, the Tenth Circuit's holding that the evidence supported the jury's verdict did not constitute a resurrection of the D.C. Circuit's "significant control" test that the *Reves* Court

rejected. Pet. 20. The Tenth Circuit's observation that "abundant evidence" supported the verdict did not establish a new pleading or proof requirement under § 1962(c), as petitioners apparently contend.

The Eleventh Circuit's decision in *United States v. Castro* is also unhelpful to petitioners: it addressed convictions under the RICO conspiracy statute, 18 U.S.C. § 1962(d), to which the "operation or management" test does not apply; and the court expressly acknowledged that *Reves* permits liability under § 1962(c) for outsiders or lower-level insiders upon a showing of sufficient control. 89 F.3d 1443, 1452 & n.5 (11th Cir. 1996).

Finally, petitioners mischaracterize the Second Circuit's holding in *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004), by suggesting that "assist[ing]" in a fraud is enough to satisfy the "operation or management" test in the Second Circuit. Pet. 21. In *First Capital*, the enterprise was a bankruptcy estate, and the defendants were the bankrupt person and his mother. *Id.* at 177–78. Together, they directed the bankruptcy estate's affairs by lying to the bankruptcy court and trustee and transferring money to defraud the court. Their intimate involvement in manipulating the bankruptcy proceedings went far beyond merely assisting in a fraud—they were controlling the estate.

In short, none of petitioners' cases shows that any circuit requires more or less "control" than the other circuits. Petitioners have succeeded only in showing that the application of the correct legal standard to different facts and different records can lead to different results in different cases.

3. Nor is there an intra-Eighth Circuit conflict, as petitioners suggest. Pet. 27–29. Petitioners contend there is a conflict between the Eighth Circuit's decision below and that court's decisions in *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997) and *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995). According to petitioners, the decision below required plaintiffs to prove that an outsider exercised "some degree of control" over the enterprise. Pet. 27. By contrast, petitioners contend, the Eighth Circuit in *Handeen* purportedly held that it was "not necessary that a RICO defendant have wielded control over the enterprise," and in *Darden* the Eighth Circuit purportedly held that a RICO defendant need not have any part in the "control" of the enterprise. Pet. 27.

Petitioners are incorrect. *Darden* was an insider case (*see id.* at 1516–17) and established only that a mid-level drug dealer can be liable under Section 1962(c) for his "participation" in the conduct of the affairs of a drug-trade enterprise. *Id.* at 1542–43. Similarly, the passage from *Handeen* quoted by petitioners, read in context, stands only for the proposition that *Reves* does not require a showing of *absolute* control over the enterprise, only a showing of "some part in the direction" of the enterprise. *See Handeen*, 112 F.3d at 1348 (emphasis removed; citation omitted). The very circuit whose test this Court adopted in *Reves* did not misapply Section 1962(c) in *Handeen*.

Indeed, although *Handeen* reversed an order dismissing a RICO claim against an outsider, the facts there were very different. The RICO defendant in *Handeen* was a law firm and the enterprise was a bankruptcy estate. According to the complaint's

allegations, the law firm devised the plan for bankruptcy, instructed the bankrupt person's parents to create false promissory notes, and participated in devising a scheme to conceal the bankrupt person's assets; in sum, the firm "[took] the lead in making important decisions concerning the operation of the [estate]." *Id.* at 1350.

In the present case, by contrast, the court found no evidence that Holdrege, as lender to DCC, acted as anything other than a creditor protecting its own interests and that all of DCC's decisions were made by Damrow, its manager and significant shareholder. Pet. App. 14–15. Unlike in *Handeen*, there is no evidence here that Holdrege devised Damrow's feed lot frauds (e.g., double-counting of cattle) or took the lead in carrying them out. (Indeed, it would be economically irrational for Holdrege to take a role in planning and carrying out the fraud against itself that Damrow ultimately pleaded guilty to.) The different outcomes in *Handeen* and this case follow from the stark differences in their facts.[4]

4. Petitioners also assert that the circuits are divided in situations where an outsider "knowingly provides goods or services to a RICO enterprise." Pet. 22. But contrary to petitioners' contention, the

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[4] Moreover, courts of appeals can resolve their own intra-circuit conflicts through en banc proceedings. Even if an intra-circuit conflict existed, it would not warrant this Court's intervention. Petitioners made the intra-circuit conflict argument in the court of appeals (Pet. for Reh'g at 1, 7, 9), but that court denied the petition for rehearing without calling for a response.

three cases cited in the petition on this issue are fully consistent with one another and with *Reves*.

In *University of Maryland v. Peat, Marwick, Main & Co.*, the Third Circuit held that an outside accountant does not participate in the operation or management of an enterprise (an insurance company client) merely by providing accounting services, consulting services, and by attending meetings—even though those services are "important and indispensable" to the functioning of the enterprise. 996 F.2d 1534, 1539 (3d Cir. 1993). That is entirely consistent with the decision below, in which the Eighth Circuit concluded that the bank was "acting like a bank" in providing services to the Damrow entities. Pet. App. 12 ("Bankers do not become racketeers by acting like bankers") (citation omitted).

Similarly, in *Goren v. New Vision International, Inc.*, the Seventh Circuit affirmed the dismissal of a § 1962(c) claim because the plaintiff alleged only a business relationship between the defendants and the enterprise and did not allege that the defendants had any part in directing the enterprise's affairs. 156 F.3d 721, 727–28 (7th Cir. 1998). That is a straightforward application of Section 1962(c) that does not conflict with the decision below.

Finally, in *Davis v. Mutual Life Insurance Co. of New York*, the Sixth Circuit held that there was extensive evidence supporting a jury finding of liability. 6 F.3d 367, 380 (6th Cir. 1993). Essentially, the defendant insurance corporation in that case managed the association-in-fact enterprise through one of its senior sales managers, who also headed the enterprise. *Id.* Petitioners themselves characterize the key language in *Davis* as "*dictum*." Pet. 22. And in any event, *Davis* did not hold—and

could not have held—that merely providing goods or services to an enterprise can by itself meet the *Reves* test. The insurance company in *Davis* was not simply providing goods or services to the enterprise; it was using its sales agent to fraudulently sell its products through the enterprise. These three cases do not represent a circuit conflict in circumstances where an outsider provides goods or services to a RICO enterprise.

5. Petitioners also contend that some circuits have adopted a *per se* rule precluding § 1962(c) liability for outsiders. Pet. 16, 30–32. This contention is also incorrect. *Reves* itself addressed this issue in response to an argument made by United States as *amicus*. Section 1962(c), the Court explained, "cannot be interpreted to reach complete 'outsiders' because liability depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." 507 U.S. at 185. "Of course," the Court continued, "'outsiders' may be liable under § 1962(c) if they are 'associated with' an enterprise and participate in the conduct of *its* affairs—that is, participate in the operation or management of the enterprise itself." *Id.* Thus, under *Reves*, there is no *per se* immunity for outsiders; the court must examine whether the outsider conducted only its own affairs or went beyond that and participated in the operation or management of the enterprise itself. Establishing a *per se* rule of outsider immunity would directly contradict *Reves*—and no court has created such a rule. Petitioners cite no cases articulating or adopting such a *per se* rule of immunity—only law review articles claiming that courts have done so. Pet. 30–32.

6. Petitioners' hodge-podge of other arguments do not demonstrate the need for this Court's review. The assertion that review is warranted because the First, Second, and Ninth Circuits are "result-oriented" is vague, somewhat indelicate, and in any event is not borne out by the cited cases. Pet. 21. In each of the four cases, the court of appeals cited *Reves* and applied the "operation or management" test to the evidence. These four cases are highly fact dependent, not "result-oriented."

Similarly, petitioners' lengthy quotation (Pet. 23–26) from the Second Circuit's decision *United States v. Allen* does nothing more than demonstrate that summary judgment is inappropriate if there are disputed issues of material fact on the "operation or management" issue. 155 F.3d 35, 43 (2d Cir. 1998). It does not reflect a special Second Circuit rule that every case under § 1962(c) must go to trial.

Finally, petitioners' citations to district court decisions do not help establish a circuit conflict, and petitioners' heavy reliance on six pages of citations to law review articles critical of *Reves*—most of which were written shortly after *Reves* was decided—demonstrates only that the legal academy does not always agree with this Court's decisions. That academic commentary does not in any way suggest that the decision below was incorrect or that it creates a conflict in the lower courts. Pet. 29–35.

7. Contrary to petitioners' assertions, the courts of appeals have been remarkably consistent in their application of *Reves*. The courts themselves have not suggested that any inter-circuit conflict exists. This is in stark contrast to the years immediately prior to *Reves*, when the courts of appeals expressly recognized the conflict on the "conduct" element of a

§ 1962(c) claim. *See Yellow Bus Lines*, 948 F.2d at 952; *Arthur Young & Co.*, 937 F.2d at 1324.

The courts of appeals also regularly cite each other and rely on each others' analyses when applying *Reves*'s "operation or management" test to new RICO theories and fact patterns. Petitioners' own cases demonstrate this inter-circuit harmony. *See, e.g.*, *First Capital Asset Mgmt., Inc. v. Satinwood*, 385 F.3d 159, 176–77 (2d Cir. 2004) (citing the Eighth and Tenth Circuits); *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932–33 (7th Cir. 1999) (citing the Third, Sixth, and Ninth Circuits); *Handeen v. Lemaire*, 112 F.3d 1339, 1348 (8th Cir. 1997) (citing the Second, Third, and Ninth Circuits). Indeed, in this very case the Eighth Circuit canvassed the federal courts for analogous situations and concluded that it "ha[d] not found any post-*Reves* case in which a bank or financial services company was held to have conducted the affairs of a RICO enterprise that was an unrelated customer of the bank." Pet. App. 11. The court cited to and relied upon the analyses of the Third Circuit and the Southern District of New York and agreed with those courts that a bank does not satisfy *Reves* when it acts like a bank. Pet. App. 10–11. Far from creating a conflict, the decision below is another example of the consistency with which *Reves* has been applied when outside actors (like banks, accountants, and attorneys) are sued under RICO § 1962(c).[5]

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[5] Although petitioners now contend that three district court cases have imposed RICO liability on banks under § 1962(c), petitioners did not cite those cases in their court of appeals' brief or in their petition for rehearing. In any event, district

[Footnote continued on next page]

CONCLUSION

The Eighth Circuit below applied the correct principle of law under *Reves*: an enterprise outsider will not be liable under § 1962(c) unless he had "some part in directing" the affairs of the enterprise. 507 U.S. at 179. The court analyzed the facts, sought guidance from its own precedents and from the decisions of other circuits, and concluded (without dissent) that there was insufficient evidence for the jury to find that the bank, Holdrege, conducted the affairs of its borrower, DCC. This decision represents a faithful application of *Reves* to the particular facts of this case, and it does not create a conflict in the courts of appeals. The petition for a writ of certiorari should be denied.

[Footnote continued from previous page]
court cases do not establish division in the courts of appeals. Moreover, although these three cases involved banks, they decided motions to dismiss which accepted as true the plaintiffs' allegations that the defendant banks had participated in the "operation or management" of the RICO enterprise. Pet. 32 n.8.

Respectfully submitted.

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